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No. 83-945

IN THE

# Supreme Court of the United States

OCTOBER TERM 1983

UNION OIL COMPANY OF CALIFORNIA,
*Petitioner,*

vs.

DILLINGHAM TUG & BARGE CORPORATION, NICKUM & SPAULDING ASSOCIATES, INC., and THE SALVAGE ASSOCIATION,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED

Should certiorari be granted as to respondent The Salvage Association ("Association"), the following question would be presented:

1. The Salvage Association conducted an insurance survey of a river barge for a one-time ocean tow. The barge had been modified prior to the tow, and the Association asked a naval architect to review certain calculations which had been prepared by the architects who had designed the modifications. The trial court found the Association vicariously negligent for the barge's loss at

sea solely because the naval architect failed to discover certain omissions in those calculations, and then held that that imputed negligence was a proximate cause of the barge's loss. Was there substantial evidence to support that causation finding where:

a) the evidence purportedly showing that performance of the omitted calculations by the designing architects would have made a difference was "concededly unreliable," and

b) the uncontradicted evidence established that if the tug had towed the barge as contemplated, the barge would not have been lost?

## STATEMENT OF THE CASE

### A. The Facts

In May 1976, Collier Carbon and Chemical Corporation ("Union"), then a subsidiary of Union Oil Company, purchased the COLUMBIA, a 300-foot river barge. Union decided to have it towed from Galveston, Texas to Portland, Oregon. For this one-time ocean tow, Union hired naval architects Nickum & Spaulding Associates, Inc. ("Nickum & Spaulding") to draw plans and specifications to modify the barge. At Union's request, Nickum & Spaulding's design kept the COLUMBIA as an open hopper barge but added 36 metal tie-down straps four feet in width to hold two large cargo tanks in the barge. (Ex. 112, p. 6; RT 1246)

Union hired the Salvage Association to perform an "insurance survey" so that Union could obtain insurance for the tow. The Association was paid $1,250 for the insurance survey. (RT 1800) The Salvage Association issued its certificate, stating that the barge was "fit to proceed on the voyage contemplated," and Union got the insurance it wanted. (Ex. 85, p. 6) The Association left no doubt as to what voyage was "contemplated"; its certificate contained certain "special considerations" as to how the tug was to perform the tow, including:

— The towing speed was not to exceed 8 knots, and if weather conditions required it, the towing speed was to be reduced to eliminate any possible damage to the barge; and

— The tug's crew was to check the barge periodically to insure that it had not taken on water, and if it had, the water was to be pumped out immediately. (Pet., Ex. 4, p. 21, Fdg. 20)

Union hired Dillingham Tug & Barge Corporation ("Dillingham") to tow the barge. The towage contract explicitly required Dillingham to give "due regard" to the Salvage Association's "special considerations." The tug's captain knew that the Association's "special considerations" were to be followed, and he signed and took a copy of them with him. (Ex. 85, p. 3; RT 494-95) He particularly knew that the barge was to be pumped out at "every opportunity," admitting that that was "part of the deal". (RT 480) The captain assured the Association that the hopper would in fact be pumped out and that he "would do it at port, if necessary, and if the bow was taking on water, I would make sure I got somewhere I could do it. I guaranteed them that." (RT 382) He promised that if he could not reach port or get a man aboard the barge at sea, he would just "have to pull into some cove" and pump the barge out. (RT 395-96)

Union gave a copy of Nickum & Spaulding's calculations to the Association. Although nothing in the survey contract required the Association to do anything with them (Ex. 85, p. 1), the Association gave them to an independent naval architect, Mr. Waller, and asked him to look them over, paying him $200 to do so. (RT 1251)[1] The trial court concluded that Nickum & Spaulding's calculations were negligently performed because they did not include calculations as to the stress the tie-down straps would encounter in dynamic water conditions with the barge's hopper flooded. (Pet., Ex. 1, p. 10) Mr. Waller did not conclude that the absence of those calculations was an error, and it is solely because he did not reach that conclusion that the trial court held Mr. Waller negligent and then, by imputation, held the Association negligent. (Pet., Ex. 4, pp. 28-29, Concl. 6)[2]

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[1] Accordingly, Union's statement that the Salvage Association, itself, reviewed the Nickum & Spaulding calculations (Pet., p. 3: 9-10) is untrue.

[2] Accordingly, Union's statement that the trial court found the Association negligent in the performance of its survey "and the review of engineering calculations" (Pet., p. 5) is untrue; the sole basis for the finding of negligence was Mr. Waller's review of the Nickum & Spaulding calculations.

The trial court's finding that the absence of dynamic, hopper flooded calculations contributed to the loss of the barge rested on a computer printout which purportedly showed the results of such calculations. (Pet., Ex. 1, p. 11) But the "uncontradicted testimony" established that the program did not produce reliable results when applied to this barge. (*Id.*)

In addition, the Dillingham tow was not what was "contemplated." When the barge left Panama, it had over one foot of water in its forward compartment, but the tug captain failed to pump it out as promised. (Pet., Ex. 4, p. 22, Fdgs. 23 & 24). On February 20, the barge laid over in Acapulco for 22 hours, yet it was still not pumped out, although it could have been. (Pet., Ex. 4, p. 23, Fdg. 26)

Moreover, despite bad weather and ten foot seas, the barge was towed in excess of the Association's eight-knot limitation on every day after Panama except the day on which the barge was lost. (Pet., Ex. 4, pp. 22-23, Fdg. 25) The excess speed increased the pounding which the barge experienced, augmenting both the loads on the metal straps and the large amount of water entering the hopper.

By February 25, the barge was " 'pitching hard in rough (northwesterly) swells' as [it] encountered 'heavy sea (from) head on.' " (Pet., Ex. 4, p. 23, Fdg. 27). By 0730 on that day the barge had taken on so much water that its painted white draft marks could not be seen (*Id.*, Fdg. 28; RT 596)[3], and it was pounding and taking spray and possible green waves into the hopper. (*Id.*, Fdg. 28; RT 584). As of that time, "it was apparent . . . that the barge was in peril". (Pet., Ex. 4, p. 26, Concl. 3)

Nevertheless, the tug's captain did not pump out the barge, wait out the bad weather, turn the barge into the trough of the swells to reduce pounding and taking on of water, or seek refuge in the port of Bahia Santa Maria, then only twenty miles to the east. (Pet., Ex. 4, pp. 23-24, Fdgs. 27-30; RT 621-22,

[3] The Association had recommended the painting of the white draft marks. (Ex. 85, p. 6) The tug's crew understood that those marks were there so they could determine if the barge had taken on water (Pet., Ex. 4, p. 22, Fdg. 22), and they knew it was "important" to check them day and night. (RT 182)

141-42, 231, 593-94) Instead, the tug continued to tow the barge into the ten-foot waves for hours. (Pet., Ex. 4, pp. 23-24, Fdgs. 28-30; RT 599, 749-50) When the tug finally decided to seek refuge, it headed for Bahia Ballenas, which was more than 100 miles away and in a direction which required the barge to be towed into the swells. (Pet., Ex. 4, p. 24, Fdg. 31) By then it was too late; the cargo tanks broke loose, and the barge sank. (*Id.*, Fdgs. 32-35)

**B. The Court of Appeals' Decision**

The Court of Appeals for the Ninth Circuit affirmed the finding of negligence as to Nickum & Spaulding. Contrary to Union's statement (Pet., p. 15:4-6), the court did not address whether there was any evidence to support the finding that the Salvage Association was negligent. (Pet., Ex. 1, p. 12) Instead, the court reversed the judgments against both Nickum & Spaulding and the Association on the ground that the trial court's causation finding was "clearly erroneous." (Pet., Ex. 1, p. 11) The court based that conclusion on two grounds:

First, it held that "causation, in this case, would necessitate a finding that, had the omitted calculations been performed, they would have demonstrated the straps were not in fact sufficient for the contemplated voyage." While the trial judge did make such a finding, it rested on a "concededly unreliable" computer program, making the finding clearly erroneous. (Pet., Ex. 1, p. 11)

Second, the uncontradicted evidence established that "had Dillingham conducted the tow as they were advised to, the barge would have survived the tow and therefore the barge was properly designed for the contemplated tow." Accordingly, the Nickum & Spaulding calculations were not the cause; "the barge was lost due to Dillingham's failure to conduct the tow properly." (*Id.*, pp. 11-12)

## REASONS FOR DENYING THE WRIT

Nowhere does Union's Petition show any "special and important reasons" to grant the writ as to Nickum & Spaulding or the Salvage Association.[4] (Rule 17.1) The Petition does not even assert that the court of appeals' decision respecting causation creates a conflict among the circuits, or with the decisions of this, or any other, court. Nor does the Petition suggest that that decision raises any question of law, unsettled, important or otherwise.

Instead, the Petition argues only that this Court should grant a hearing to consider whether the court of appeals was correct in reversing the trial court's factual causation holding in this particular case. (Pet., pp. 14-21) The Petition does not and cannot contend that the review of that factual question would have any significance beyond this case.

But "[t]his Court does not sit for the benefit of particular litigants . . . ." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73-74 (1932) (Frankfurter, J.) Nor is this Court "the place to review a conflict of evidence [or] to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other. . . ." *National Labor Relations Board v. Pittsburg Steamship Co.*, 340 U.S. 498, 503 (1951). *See e.g., United States v. ITT Continental Baking Co.*, 420 U.S. 223, 226-27 n.2 (1974); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178-79 (1938); *Federal Trade Commission v. American Tobacco Co.*, 274 U.S. 543, 544 (1927) (The Court is to "adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeal depend on appreciation of circumstances which admit of different interpretations.")[5] Accordingly, the Petition shows on its face that it should be denied.

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[4] Petitioner's arguments as to the Ninth Circuit decision's purported conflict with *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) and with decisions of other Circuit Courts of Appeals pertain only to the Union-Dillingham towage agreement. (Pet., pp. 7-14) A decision by this Court on the enforceability of that agreement would not affect the Ninth Circuit's

*(Footnotes continued on following page)*

Moreover: (a) The court of appeals was clearly correct on the factual causation issue the Petition discusses; (b) the court of appeals had an independent basis for its causation ruling which the Petition does not discuss; and (c) the court of appeals' result as to the Salvage Association is right, regardless of the causation issue. We turn to those points next; each independently establishes that the Court should deny review of the Petition's second question.

## A. The Court of Appeals Correctly Held That The Improper Tow Was the Cause.

Union argues that the tow provided by Dillingham was what the parties contemplated, and it then spends four pages quoting testimony to the effect that the parties expected water to get into the barge. (Pet., pp. 16-19)[6] But what Union does not tell the Court is that the Association's special considerations called for the tug to pump the water out, and that the tug's captain "guaranteed" he would do so. Thus, while the parties

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*(Footnotes continued from preceding page)*

disposition of Union's claims against Nickum & Spaulding or the Salvage Association. The Court, of course, is free to grant certiorari on limited issues. *E.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 424 U.S. 908 (1976); *Davis v. Mississippi*, 393 U.S. 821 (1968).

[5] This case is not within the range of exceptions carved out by this Court. It is neither a First Amendment factual matter (e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 189 (1964)), nor a due process criminal procedure case (*e.g., Chambers v. Florida*, 309 U.S. 227, 228-29 (1940)). For some years, the Court occasionally granted certiorari on factual matters to review the application of the Federal Employers' Liability Act or in longshoremen's injury actions. *See e.g., Bailey v. Central Vermont Ry., Inc.*, 319 U.S. 350, 356-58 (1943) (Roberts, J. dissenting); *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 111 (1959) (Frankfurter, J. dissenting). 13 Moore's Federal Practice ¶ 817.41 at SC17-44 (1982). Petitioner's case, *Guzman v. Pichirilo*, 369 U.S. 698 (1962) falls in this category and time period. This case does not.

Besides, in *Guzman v. Pichirilo* certiorari was granted because there was a conflict between the Circuits on a point of law. 369 U.S. at 699, 703-04. The Court did not grant certiorari to review a factual record (even though the Court, in the end, avoided decision on the legal issue).

[6] Even Union admits that "the cause for water entering the hopper was Dillingham's negligence." (Pet., p. 20)

may have contemplated that water might splash into the open barge, "part of the deal" was that it would not stay there, but would be pumped out.

Contrary to its contract, its duty of due care and the captain's guarantee, the tug never pumped the barge out. It also towed the barge at excessive speeds and allowed it to become flooded with water. Moreover, even after it was "apparent . . . that the barge was in peril" (Pet., Ex. 4, p. 26, Concl. 3), the tug continued to tow it, flooded, into rough head seas for five and a half hours. (Pet., Ex. 4, pp. 23-24, 26, Fdgs. 28-32, Concl. 3) Union points to no evidence — and there is none — which would support a finding that the parties contemplated such an irresponsible tow.

Finally, Union does not deny that had the tug acted properly, the barge would have survived the tow (Pet., Ex. 1, p. 11); indeed, such evidence came from its own expert. (*Id.*, p. 11, n.7) In these circumstances, it is hardly fair — or accurate — to say that the court of appeals "departed" from its accepted role in reversing the finding of causation. To the contrary, it was entirely correct.[7]

**B. The Court of Appeals' Alternate Basis For Its Causation Holding Is Undisputed.**

Contrary to Union's implication, the court of appeals' causation holding does not rest solely on the undisputed evidence establishing that if the barge had been towed as contemplated, it would not have been lost. The court of appeals also held that there was no reliable evidence to support a finding that if the omitted calculations had been performed, they would have demonstrated that the tie-down straps were insufficient. (Pet., Ex. 1, p. 11)

[7] Union does not dispute the law that where a tug imprudently fails to save a tow when obviously in peril, the tug is the sole proximate cause of the loss, even if the condition creating the peril was caused by another. See *American Bridge Division, U.S. Steel Corp. v. Roen Steamship Co.*, 216 F.Supp. 353 (E.D. Wis. 1963) *aff'd*, 328 F.2d 838 (7th Cir. 1964); *Chemical Transporter, Inc. v. M. Turecamo, Inc.*, 290 F. 2d 496, 497 (2d Cir. 1961); *Mississippi Valley Barge Line Co. v. T. L. Janes & Co.*, 144 F.Supp. 662, 667-68 (E.D. La. 1956) *aff'd*, 244 F.2d 163 (5th Cir.), *cert. denied*, 355 U.S. 871 (1957); *Pillsbury v. Delta B & B*, 1979 AMC 1221, 1229-30 (E.D. La. 1978) *rev'd in other part*, 1980 AMC 2323 (E.D. La. 1979).

Union does not even mention that basis of the court's decision. Thus it does not dispute that such a finding was necessary before causation could be found; and it does not dispute that the "evidence" the trial court relied on to make that finding was not "reliable." (Pet., Ex. 1, p. 11) The court of appeals' uncontested decision to set aside a finding which rests only on "concededly unreliable" evidence raises no issue at all, let alone an issue worthy of this Court's review.

**C. The Result Is Correct in Any Event**

Although the court of appeals' decision reversing the judgment against the Association turns on the absence of any reliable evidence of cause, that is not the only basis on which the Association is entitled to judgment. Among other reasons, the Association is also entitled to judgment because:

(1) The finding that the Association was negligent cannot stand as a matter of law because there was no evidence respecting the standard of care applicable to an architect's review of another's design calculations or whether Mr. Waller breached that standard, whatever it was.

(2) There is no basis for attributing Mr. Waller's negligence, if any, to the Association because he was an independent contractor to the Association; and

(3) The undisputed evidence established that if the tug had performed the tow in accordance with the Salvage Association's "special considerations", the tow would have been successful; accordingly, the trial court held the Association liable for giving a correct opinion.

The favorable resolution of any one of these issues would entitle the Association to judgment as a matter of law.[8] The court of appeals addressed none of them because it was unnecessary for it to do so. There certainly is no need for this Court to review the court of appeals' causation holding where that review could, at most, result in a remand for consideration of these and other issues.

[8] The Salvage Association raised all of them, and others, to the court of appeals.

## CONCLUSION

The Petition should be denied.

Dated: January 5, 1984.

Respectfully submitted,

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## LIST OF RELATED COMPANIES REQUIRED BY UNITED STATES SUPREME COURT RULE 28

The undersigned, counsel of record for Respondent The Salvage Association, certifies that Rush Johnson Associates, Inc. is an affiliate of the Salvage Association.

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